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QUESTION PRESENTED

Does the Fourth Amendment require suppression of evidence seized during the warrantless search of Respondent's apartment?

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SUMMARY OF ARGUMENT

Baltimore City Police officers searched the premises of the Respondent without a warrant. The search of a fixed premise without a warrant, absent exigent circumstances, is *per se* unreasonable. No exigent circumstances existed that would trigger one of the recognized exceptions to the warrant requirement. The search was thus unconstitutional, and the fruits of the search must be suppressed.

ARGUMENT

The Fourth Amendment Requires Suppression Of Evidence Seized During The Warrantless Search Of Respondent's Apartment.

It is uncontested that the search of the Respondent's apartment was conducted without a search warrant. A search warrant had been issued to search the third floor apartment of Lawrence McWebb at 2036 Park Avenue, Baltimore, Maryland. The police expanded their search to include the apartment of the Respondent located on the same floor.

The warrant clause of the Fourth Amendment unequivocally requires that searches and seizures are to be made pursuant to a warrant and that all warrants be particular and supported by probable cause. "Searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment subject only to a few specifically delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967)

These few exceptions to the warrant requirement have been "jealously and carefully drawn" by this Court. *Jones* v. *United States*, 357 U.S. 493, 499 (1958). Before allowing the introduction of evidence seized without the prior

approval of a neutral and detached magistrate, this Court has demanded that there be a showing "by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *McDonald* v. *United States*, 335 U.S. 451, 456 (1948).

During the seventy-two years since the decision in *Weeks* v. *United States*, 232 U.S. 383 (1914), this Court has carefully defined the parameters of searches conducted outside the judicial process.

There are exceptional situations where exigent circumstances make a search without a warrant imperative. For example, the exigency created by the readily mobile character of automobiles permits a warrantless search of an automobile when there is probable cause to believe the vehicle contains contraband. *Carroll* v. *United States*, 267 U.S. 132 (1925).

Another exception to the warrant requirement, commonly referred to as the "emergency doctrine," exists in two distinct situations. One is where the police have a reasonable belief that evidence is being or is in imminent danger of being destroyed. *See, e.g., Ker* v. *California*, 374 U.S. 23 (1963). The second is where there is a danger to life and limb. *See, e.g., Michigan* v. *Tyler*, 436 U.S. 499 (1978) (firefighters permitted to enter building, without a warrant, to fight fire and were permitted to remain there for a reasonable period of time to investigate the case of the fire).

The "hot pursuit" doctrine is another exception to the warrant requirement which evolved from the emergency doctrine. In *Warden* v. *Hayden*, 387 U.S. 294 (1967), this Court approved the warrantless entry of a home to arrest the perpetrator of an armed robbery who was seen entering the house five minutes earlier. "The Fourth Amend-

ment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Id.*, at 298-299.

Police officers may also make a warrantless search of an individual who has been placed under arrest. Searches incident to an arrest are permitted because they have "always been recognized under English and American law . . . to discover and seize fruits or evidences of crime." *Weeks*, *supra*, at 392. Under certain circumstances, police officers may, without a warrant, seize evidence in "plain-view" when the discovery of the evidence is inadvertent and of incriminating value. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Finally, *Weeks*, *supra*, also recognized that an individual can give his consent to police officers to conduct a search without a warrant.

Attempts to expand the circumstances under which the exceptions can be applied have also been jealously guarded. This is especially true where the individual's sanctity in his home is threatened. Thus, the emergency doctrine has not been extended to allow the entry into a fire-damaged home five hours after the blaze has been extinguished and the homeowner has made reasonable efforts to secure his home. Such a "search must be conducted pursuant to a warrant, consent or the identification of some new exigency." *Michigan* v. *Clifford*, 464 U.S. 287, 297 (1984).

Searches incident to an arrest are limited to "a search of the person and the area into which an arrestee might reach in order to grab a weapon or evidentiary items." *Chimel* v. *California*, 395 U.S. 752 (1969). "If a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house." *Vale* v. *Louisiana*, 399 U.S. 30, 33-34 (1970).

A consent to search is scrutinized to be sure that, under the totality of the circumstances, it is voluntary. A consent is voluntary if it is not "the result of duress or coercion, express or implied." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248 (1973).

The touchstone of the Fourth Amendment is reasonableness. As discussed earlier, this Court, since *Weeks*, has "jealously and carefully" drawn those exceptions to the warrant requirement which are reasonable. These exceptions have been carefully delineated to strike a delicate balance between society's interest in combating crime and an individual's reasonable expectation of privacy. None of the exceptions discussed infringe upon the Fourth Amendment because the exigencies presented by each situation have supported the reasonableness of the warrantless searches.

The exigencies that must exist to allow the warrantless entry and search of a home are substantial because the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton* v. *New York*, 445 U.S. 573, 585 (1980), (citation omitted). "At the very core [of the Fourth Amendment] stands the right of a [person] to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511 (1961). *Katz*, *supra*, reaffirms that warrantless searches are *per se* unreasonable except where the facts and circumstances surrounding a warrantless search fall within one of the recognized exceptions.

None of the recognized exceptions to the warrant requirement have been urged by the Petitioner to validate the warrantless entry and search of the Respondent's apartment. The search of the Respondent's apartment,

having been conducted without a warrant and without any exigency precipitating one of the recognized exceptions, was *per se* unreasonable and thus unconstitutional.

Petitioner is seeking a radical new exception to the warrant requirement which would condone warrantless searches whenever a police officer believes he has the right to conduct a warrantless search. Relying on language in *United States* v. *Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) and *Massachusetts* v. *Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984), the Petitioner is asking this Court to carve a novel "good faith" exception to the warrant requirement. This reliance is misplaced.

Leon and *Sheppard*, by upholding searches conducted with the approval and direction of warrants signed by a detached and neutral magistrate, reaffirmed the Fourth Amendment's warrant requirement.

> Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches from the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'" *United States* v. *Chadwick*, 433 U.S. 1, 9, 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977) (quoting *Johnson* v. *United States*, 333 U.S. 10, 14, 92 L.Ed. 436, 68 S.Ct. 367 (1948), *we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." United States* v. *Ventresca*, 380 U.S. 102, 106, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965). See *Aguilar* v. *Texas*, 378 U.S., at 111, 12 L.Ed. 2d 723, 84 S.Ct. 1509.

Leon, supra, at 913-914. (emphasis added).

The search of the Respondent's apartment was an error of constitutional dimension. It was a search required by the Fourth Amendment to be conducted with a warrant. In *Leon* and *Sheppard* the police officers had warrants authorizing the searches they conducted. The officers having done what the Fourth Amendment required, it was reasonable for them to rely on the warrants they had obtained to conduct their searches.

In the instant case, the police officers had not obtained a warrant to search the Respondent's apartment. They had a warrant which particularly described the apartment of Lawrence McWebb as the premise to be searched. The warrant did not authorize the search of anyone else's apartment. Unlike the situations in *Leon* and *Sheppard*, the police officers in the instant case made the fatal mistake, not the issuing magistrate.

Petitioner has not shown that any exigency existed at the time of the warrantless entry into Respondent's apartment which would allow even the consideration of a "good faith" exception to the warrant requirement. *See*, *McDonald* v. *United States*, *supra*. No amount of probable cause will allow the warrantless entry into a fixed premise. *See*, *Agnello* v. *United States*, 269 U.S. 20 (1925); *Johnson* v. *United States*, 333 U.S. 10 (1948); *Katz* v. *United States*, *supra*. Similarily, no amount of reasonable mistake or good faith should allow the warrantless search of a fixed premise.

Petitioner also seeks to condone the warrantless search of the Respondent's apartment because of this Court's recognition of good faith conduct by police officers when they have mistakenly arrested the wrong individual, *e.g.*, *Hill* v. *California*, 401 U.S. 797 (1971), or when arresting an individual pursuant to a later invalidated ordinance,

e.g. Michigan v. *DiFillippo*, 443 U.S. 31 (1979). The arrests in *Hill* and *DiFillippo* were reasonable under the Fourth Amendment because there was adequate probable cause to affectuate the arrests. In the instant case, there was no probable cause to search the Respondent's apartment. Thus the search was unreasonable.

Petitioner's arguments ignore the decisions of this Court that place greater protection on a fixed premise than on the individual. Under the common law, a person who is suspected of having committed a felony can be arrested without a warrant. But that same suspect can not be arrested within a fixed premise (absent exigent circumstances, *e.g. Warden* v. *Hayden*, *supra*[1]), without a warrant regardless of the amount of probable cause. *See*, *Payton* v. *New York*, *supra*. This is because "the Fourth Amendment has drawn a firm line at the entrance to the house." *Id.*, at 590.

> The Fourth Amendment protects the individual's privacy in a variety of settings. *In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home*—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U.S. 505, 511.

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[1] In accord, *Welsh* v. *Wisconsin*, 466 U.S. 740, (1984), officer must consider the gravity of the offense when claiming hot pursuit; Court refused to extend doctrine to the warrantless entry into a home to arrest an individual for a civil traffic offense.

Id., at 589-590 (emphasis added).

An individual can be subjected to a limited warrantless intrusion of his person—a stop and frisk—for the purpose of ascertaining whether he is carrying or concealing a weapon when an officer has reasonable, articulable suspicions that the person is armed. *See, Terry* v. *Ohio*, 392 U.S. 1 (1968). A stop and frisk is a lesser form of a full scale seizure and search. This same type of limited intrusion into a person's home to search for weapons, fruits or instrumentalities of crime is not permitted.

The scope of the warrantless search of an automobile announced in *Carroll* v. *United States, supra*, has been expanded to allow a search "as thorough as a magistrate could authorize in a warrant 'particularly describing the place to be searched.'" *Ross* v. *United States*, 456 U.S. 798, 800 (1982).

A person has a lesser expectation of privacy when he is walking outside amongst society or when he is driving his vehicle upon our nation's roads. His actions can be observed by anyone in his vicinity. But in his home, he has his greatest expectation of privacy—he is safe from unwarranted intrusion by the government.

Recently, the distinction between a person's greater protection in his home was implicitly reaffirmed in *California* v. *Carney*, ___ U.S. ___, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). In *Carney* Chief Justice Burger noted that a mobile home, while it may have many attributes of a home, still clearly falls within the scope of the automobile exception applied in *Carroll* and its progeny. Thus, in determining that a mobile home falls within the classification of a vehicle, a warrantless search is permissable. Implicitly, if the mobile home had been

found to be the equivalent of a fixed premise, a warrantless search would have been impermissable.

Finally, Petitioner is attempting to justify the warrantless search of the Respondent's apartment because of the police officers' good faith reliance on an imprecise description of the premises to be searched. Petitioner cites no cases in support of this theory. Instead, Petitioner has presented cases which have upheld searches conducted with a warrant which were under attack for failing to particularly describe the place to be searched, when evidence sought to be excluded came from the area directed to be searched by the search warrant.[2] None of these cases allow the scope of the search to extend beyond the area described in the warrant.

The Courts have refused to condone searches that have exceeded the scope of a warrant's authorization. *See*, *Keiningham* v. *United States*, 287 F.2d 126 (2nd Cir. 1960) (search warrant for home, described as 1106 Eighteenth Street, N.W. did not allow the search of neighboring property, 1108, even though a freshly cut door existed between the homes); *Flowers* v. *State*, 88 Okla. Crim. 252 (1949) (warrant authorizing search of a specific room in hotel cannot be used to search another separately occupied room).

The decision by the Court of Appeals of Maryland did not invalidate searches, pursuant to a warrant, of a subunit even though the police erroneously enter a premise not specified in the warrant before locating the premise specified in the warrant. The Court correctly invalidated

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[2] *See, Annot.*, Search Warrant: Sufficiency of Description of Apartment or Room to be searched in Multiple-Occupancy Structure, 11 A.L.R. 3d 1330 (1967, 1985 Supp.).

the seizure of items from premises not described in the warrant in accordance with the decisions of this Court. The warrant authorized the search of McWebb's apartment; it did not authorize the search of Respondent's apartment.

Police officers, when preparing to obtain a warrant to search a subunit within a multi-residence dwelling, must be required to ascertain with great certainty the proper location of the subunit. If required to do so the likelihood of unwarranted intrusions into the homes of others would be greatly diminished.

The changing character of residences in contemporary America requires no less. Today, millions of persons live in multi-unit dwellings. Many of these are built for multi-occupancy. Many more are older homes that, because of a changing socio-economic climate, have been converted into multi-residence dwellings. Persons living within older homes which have been converted into multi-unit dwellings have the same reasonable expectation of privacy guaranteed by the Fourth Amendment as do persons living in a single-family mansion. To protect persons living in a multi-unit dwelling from unwarranted intrusions, great care must be taken to ascertain the subunit sought to be searched. Only if the fruits of unwarranted searches from the homes of persons who are not the subject of authorized police investigations are suppressed, will the Fourth Amendment continue to protect society against unreasonable searches.

CONCLUSION

The Fourth Amendment protects our basic right to be free from unreasonable searches and seizures and further requires that all warrants be particular and supported by probable cause. The Court of Appeals of Maryland upheld the Fourth Amendment by ruling that the search of the Respondent's apartment was unreasonable because the warrant did not authorize the search of his apartment. The Petitioner seeks to have this Court ignore the Fourth Amendment's requirements by allowing searches of premises not authorized by a warrant. The Court of Appeals of Maryland refused to ignore the dictates of the Fourth Amendment as requested by the Petitioner. It upheld this Court's decisions that searches without a warrant are presumptively unreasonable. The Petitioner has not presented any sound justification for creating a new exception to the warrant requirement. Therefore, it is respectfully submitted that the decision of the Court of Appeals of Maryland be affirmed.

Respectfully submitted,

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